2010

# The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave

Mary A. Celeste
*American Judges Association*

AN AMERICAN JUDGES ASSOCIATION WHITE PAPER

# The Debate over the Selection and Retention of Judges:

## How Judges Can Ride the Wave

Mary A. Celeste

There is a surge in the debate in the U.S. over the methods of judicial selection and retention, with some rallying for merit-selection plans, others continuing to support judicial elections, and virtually no one proposing lifetime appointments. The impetus for this surge may be related to three recent U.S. Supreme Court cases, *Republican Party of Minnesota v. White*,[1] *Citizens United v. Federal Election Commission*,[2] and *Caperton v. A.T. Massey Coal Co.*,[3] and to the exploding amount of campaign funds raised in judicial elections. These factors seem to have once again brought to the forefront the judicial election method and consequently revitalized the merit method, which had been dormant for three decades. Whether this boost in the debate is tantamount to a new movement, a continuation of an old movement, a blip on the radar screen, a wave, or a full-fledged tsunami, remains to be seen. But one thing is clear: since the United States' inception, there have been periodic movements to change the method of selecting and retaining judges, and the methods have often been complex and convoluted.

There were essentially three major movements in the U.S.,[4] which I will refer to as the "Original Lifetime Appointment Movement," the "Jackson Democracy Movement," and the "Progressive Reform Movement." Not unlike the present debate, political, legal, social, and cultural factors have all served as the catalysts for these movements. Although there have been some slight variations, these movements essentially involve four different selection methods: lifetime appointment, partisan election, nonpartisan election, and merit selection and retention. These movements have been in a constant state of flux, with many states using constitutional amendments, legislative acts, ballot initiatives, and executive orders to both move in and out of the methods, and to make modifications short of complete overhauls. For example, 9 of 16 states that initially only used the appointment method switched to judicial elections for some level of their judiciary,[5] 14 states changed from partisan to nonpartisan elections,[6] and 15 states have changed from partisan or nonpartisan elections to some form of the merit method.[7] When all is said and done, over the last 234 years, this activity has resulted in 39 states deviating substantially from their initial selection method. Notwithstanding these major changes, there have been far more slight modifications and failed attempts, than an actual change in judicial-selection methods. There were approximately 358 method modifications, including but not limited to, the creation of commissions, change in term lengths and periods, change in the mandatory retirement age, and change in the appointing authority.[8] Additionally, there have been approximately 66 failed attempts to change methods.[9]

With the exception of some novel intermittent arguments, the debate over which method is best has remained fundamentally the same. While the parties taking up the various causes have changed over time, including former U.S. Supreme

The author expresses her appreciation to several people who provided special assistance with this white paper: Lori Ella, her judicial assistant; Margaret Pollard, a law student at George Washington Law School, who helped author portions of the section entitled "The Debate"; Judge James McKay, my muse; Judges Kevin Burke, Elliott Zide, Gayle Nachtigal, and Gary Cohen; Wisconsin Chief Justice Shirley Abrahamson; Mary McQueen, David Rottman, and Jesse Ruttledge of the National Center for State Courts; Professor Kristen Miccio of the Denver Sturm College of Law; Cynthia Gray of the American Judicature Society; and lawyer Joe Vanlandingham.

**Footnotes**

1. 536 U.S. 765 (2002).
2. 130 S. Ct. 876 (2010).
3. 129 S. Ct. 2252 (2009).
4. *See* Lee Epstein et al., Selecting Selection Systems 4 (2000), *available at* http://epstein.law.northwestern.edu/research/conferencepapers.2000SciStudy.pdf
5. Georgia, Kentucky, Louisiana, Mississippi, Missouri, New York, North Carolina, Pennsylvania, and Texas. American Judicature Soceity, History of Reform Efforts: Formal Changes Since Inception, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state= (last visted Dec. 14, 2010).
6. Arkansas, California, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, North Carolina, Oklahoma, Oregon, South Dakota, and Washington. *Id.*
7. Arizona, California, Colorado, Connecticut, Florida, Indiana, Iowa, Kansas, Nebraska, Oklahoma, Rhode Island, South Dakota, Tennesee, Utah, and Wyoming. *Id.* California, Oklahoma, and South Dakota appear on two lists because these states are "hybrid," employing different selection systems for different levels of their courts. American Judicature Society, Methods of Judicial Selection: Selection of Judges, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Dec. 10, 2010).
8. *See* American Judicature Society, History of Reform Efforts: Formal Changes Since Inception, *supra* note 5.
9. *See* American Judicature Soceity, History of Reform Efforts: Unsuccessful Reform Efforts, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state= (last visited Dec. 14, 2010).

Court Justice Sandra Day O'Connor,[10] judges remain at the center of the debate. Within a historical context, this Paper will identify and discuss these movements and methods along with their catalysts. It will also set forth a snapshot of the methods currently used in each state, as well as state proposals and measures that could potentially affect these methods. In light of the recent Supreme Court cases, the Paper will discuss the impact that these methods may have on a judge's conduct. Finally the Paper will specify and restate the arguments both supporting and criticizing these methods and will review the various proposals for stopgap measures. The goal of this Paper is to identify some of the new challenges and pitfalls for judges operating within every method of retention and selection given the recent Supreme Court jurisprudence, and to educate judges about how these methods of selection and retention ebb and flow over time. Armed with this knowledge, and an understanding that change requires respect for the cultural differences of each method, judges should be able to take a leadership role in the debate.

## I. MOVEMENTS AND METHODS

### A. The Original Lifetime Appointment Movement

The first movement was very much influenced by the United States' independence from England. In the American colonies, the "king had absolute control over the appointment and removal of Judges."[11] Because the founders were concerned about how judges in England were controlled by the king,[12] they established in the Constitution lifetime appointments for all federal judges based on the advice and consent of the Senate.[13] The U.S. Constitution was modeled after the Massachusetts State constitution, which was drafted by John Adams.[14] Adams wrote that judges "should not be dependent upon any man or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior . . . ."[15] The original states followed suit with lifetime appointments,[16] but the method of appointment varied, as "seven states selected their judges by the legislature and five states had the governor appoint judges who would then be approved by a special council appointed by the legislatures."[17] Another proponent of this movement was Alexander Hamilton, who believed that if a judge engaged in judicial elections, it would affect judicial independence and hence the judiciary itself.[18] The lifetime appointment method is still used today for federal judges, U.S. Supreme Court Justices, and the state of Rhode Island.[19] Massachusetts and New Hampshire both have unlimited judicial terms, but set a mandatory retirement age at seventy.[20]

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### B. The Jackson Democracy Movement

The appointment method came under attack during the presidency of Andrew Jackson (1829–1837) when the sentiment of the country was that "governmental office holders should be accountable to the voters and, therefore, elected."[21] This movement ultimately became the largest of the three, as the decades following Jackson's presidency saw 21 of 30 states adopt the popular election method.[22] Like many other political movements, this movement was at first considered radical, a measure "intended to break judicial power through an infusion of popular will and majority control."[23] These "radicals" believed that popular election would remove the selection of judges from party leaders.[24] Scholars have attributed this move from judicial appointments to judicial elections to several factors, including "the belief that judges at the local level should be more responsive to their communities,"[25] that electing judges was considered democratic,[26] and that judicial appointments were being meted out as political patronage.[27]

This movement began in the early 1800s and continued through the civil war to the annexation of Alaska in 1959.[28]

10. Bill Mears, *Former Justice O'Connor Leads Push to End Judicial Elections*, CNN.com, Dec. 15, 2009, http://www.cnn.com/2009/CRIME/12/15/judicial.elections/; Chris Rizo, *O'Connor Leads Push Against Judicial Elections*, LegalNewsline.com, Dec. 11, 2009, http://legalnewsline.com/ news/224475-oconnor-leads-push-against-judicial-elections.
11. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. Miami L. Rev. 1, 4 (1994).
12. *See id.* at 4–5 (citing the Declaration of Independence).
13. U.S. Const. art. III, §1; art. II, § 2, cl. 2.
14. The Massachusetts Judicial Branch, John Adams and the Massachusetts Constitution, http://www.mass.gov/courts/sjc/john-adams-b.html (last visited Nov. 29, 2010).
15. *Id.*
16. Goldschmidt, *supra* note 11, at 5.
17. Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections 8 (Matthew J. Streb ed., 2007).
18. *Id.*
19. R.I. Const. art. X, § 5.
20. Mass. Const. pt. 2, ch. III, art. I; N.H. Const. pt 2, art. 73, 78.
21. Shira J. Goodman & Lynn A. Marks, *A View from the Ground: A Reform Group's Perspective on the Ongoing Effort to Achieve Merit Selection of Judges*, 34 Fordham Urb. L.J. 425, 427 (2007).
22. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 The Historian 337 (1983).
23. *Id.*
24. *Id.*
25. Running for Judge, *supra* note 17, at 9.
26. *Id.*
27. Todd Edwards, The Council of State Gov'ts, Judicial Selection in Southern States 2 (Feb. 2004), http://www.slcatlanta.org/Publications/IGA/JudicialSelection.pdf.
28. Larry C. Berkson & Rachel Caufield, Judicial Selection in the United States: A Special Report 1 (2004),http://www.ajs.org/selection/docs/Berkson.pdf.

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The first wave was between 1846 and 1860 when state constitutions were rolled out across the U.S.[29] The debate between appointment and judicial elections played out at the constitutional conventions with some states giving the debate more attention than others.[30] One scholar attributes this movement to a desire for greater judicial independence:

> In addition to direct limits on legislative power, most of these conventions adopted judicial elections. Many delegates stated that their purpose was to strengthen the separation of powers and empower courts to use judicial review. The reformers got results: elected judges in the 1850s struck down many more state laws than their appointed predecessors had in any other decade. These elected judges played a role in the shift from active state involvement in economic growth to laissez-faire constitutionalism.[31]

The reform focused on the appellate and inferior courts,[32] with the states of Vermont, Indiana, and Georgia as the first three states permitting local governments the option to elect trial court judges.[33] This trend was followed by Mississippi in 1832 and New York in 1846.[34] By 1850, 7 more states also permitted elections and by the time of the Civil War, 24 states had an elected judiciary.[35]

At the turn of the century there was a new round of debates between the appointment method and the election method proponents. Roscoe Pound,[36] noted legal scholar, in a well known speech before the ABA in 1906, stated that "putting courts into politics, and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench."[37] As a result, there was another reform of sorts with the creation of nonpartisan elections in an attempt to remove national partisan interests from state and local elections and to clean up the patronage and cronyism.[38] In 1927, 12 states employed nonpartisan elections,[39] and three other states "had already tried and rejected nonpartisan elections."[40] By the end of the movement, every state that entered the Union from 1846 to 1958 used either partisan or nonpartisan elections to select some or all of their judges.[41]

### C. The Progressive Reform Movement

The merit selection method was proposed for the purpose of removing judges from the pressures of running for political office. Merit-selection plans usually select judges through a nominating commission with gubernatorial or legislative appointment. After a specified term the judge stands for retention with no party affiliation or opponent and must receive a certain vote percentage to be retained. Some states use performance evaluations through commissions prior to the retention election,[42] while others use non-elective means of retention, like reappointment.[43] Although the merit selection and retention method, also known as the "Missouri Plan," was developed in 1913 as a compromise that combined the best features of appointment and election, it did not become a full-fledged movement until the 1950s and 1960s.[44] In 1914, it was the American Judicature Society that first pushed for retention elections through its new director Albert M. Kales, who offered a nonpartisan court plan that featured the basic elements of nomination, appointment, and elective-tenure.[45] Later, in

29. Hall, *supra* note 22.
30. Ohio, Kentucky, and Virginia devoted much attention; Iowa, Louisiana, and Missouri little attention; and "in only five conventions did the issue of popular election prove sufficiently controversial to require a roll-call vote before adoption." *Id.*
31. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review,* 123 HARV. L. REV. 1061, 1063 (2010).
32. Hall, *supra* note 22.
33. RUNNING FOR JUDGE, *supra* note 17, at 9.
34. *Id.*
35. *Id.*; *see also* BERKSON & CAUFIELD, *supra* note 28, at 1.
36. "Roscoe Pound was one of the leading figures in twentieth-century legal thought. As a scholar, teacher, reformer, and dean of Harvard Law School, Pound strove to link law and society through his 'sociological jurisprudence' and to improve the administration of the judicial system." The Free Dictionary, Pound, Roscoe, http://legal-dictionary.thefreedictionary.com/Roscoe+Pound (last visited Dec. 9, 2010). Pound was also "part of the founding editorial staff of the first comparative law journal in the U.S., the Annual Bulletin of the Comparative Law Bureau of the American Bar Association." Wikipedia, Roscoe Pound, http://en.wikipedia.org/wiki/Roscoe_Pound (last visited Dec. 9, 2010).
37. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906).
38. RUNNING FOR JUDGE, *supra* note 17, at 10.
39. *See* EPSTEIN ET AL., *supra* note 4, at 7; CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 6 (1997). Nonpartisan elections first appeared in Cook County, Illinois, in 1873. RUNNING FOR JUDGE, *supra* note 17, at 10.
40. Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons From a Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1359 (2003); *see also* RUNNING FOR JUDGE, *supra* note 17, at 10.
41. RUNNING FOR JUDGE, *supra* note 17, at 9; *see also* Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 716 (1995).
42. Alaska, Arizona, Colorado, Tennessee, and Utah. DEBORAH KILEY, MERIT SELECTION OF CALIFORNIA JUDGES 9 (Mar. 2, 1999), http://www.mcgeorge.edu/documents/centers/government/ccglp_pubs_merit_selection_pdf.pdf.
43. Connecticut, Delaware, Hawaii, and New York. *Id.* at 8–9.
44. Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 169–70 (2007).
45. The Missouri Bar, From the Report by the Commission on Judicial Independence, History of Merit Selection, http://www.mobar.org/81a9785d-c049-411d-bdd5-816ffe26a2a6.aspx (last visited Nov. 30, 2010).

1926, Harold Laski first suggested that judicial commissions do the nominating.[46]

California adopted a version of this plan in 1934.[47] Soon thereafter Missouri adopted the most familiar version hence called "the Missouri Plan."[48] It is interesting to note that Louisiana, in 1921, may have been the first state to consider the merit-selection method and has since rejected countless proposals to adopt that method, as "at least one proposed constitutional amendment calling for merit selection has been introduced in all but one legislative session" since 1978.[49] Similarly, Texas has rejected proposals to adopt the merit selection method numerous times, with ten rejections.[50] Several factors, however, largely unrelated to judicial performance, converged to halt the spread of the merit-selection method. These factors included fractious constitutional conventions, a decline in public confidence in both public and private institutions, disenchantment with the merit method, and opposition to change.[51] By the mid-1980s, "these factors essentially halted the trend to merit selection."[52]

## II. THE SNAPSHOT

### A. Current State Judicial-Selection Methods

All four of the judicial-selection methods just discussed are currently in use in various states. Sometimes states will even use some combination of several methods.[53] As a result, appeals court judges, trial court judges, and county or municipal judges, may be selected or retained using different methods within the same state. Generally, 5 states use gubernatorial or legislative merit appointments without commissions,[54] 14 states and the District of Columbia use merit selection through nominating commissions,[55] 9 states use merit selection combined with other methods,[56] 8 states use a partisan election system,[57] and 14 states use a nonpartisan election system.[58] In the 19 states that either use merit selection or appointments, judges are usually appointed by either the governor or the legislature,[59] and then face either a retention election,[60] or a reappointment process by lawmakers.

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While there is no mandatory retirement age for either U.S. Supreme Court Justices or federal judges, with the exception of one lifetime appointment state, Rhode Island,[61] the remaining states have a variety of mandatory retirement ages ranging from 70–75 years,[62] or mandatory retirement with conditional provisions,[63] or no mandatory retirement age at all.[64] In 1991, two Missouri state court judges challenged the mandatory retire-

46. *Id.*
47. In 1934, California voters adopted a merit-like retention system for appellate judges but left the decision regarding superior court judges to the counties, which still have not adopted the retention system. American Judicature Society, History of Reform Efforts: Formal Changes Since Inception, *supra* note 5. California's plan is unique in that the governor makes appointments subject to confirmation by a judicial commission, as opposed to the usual merit-selection plan where a judicial commission provides a list of nominees. *See* KILEY, *supra* note 42, at 2–3, 3 n.20. Illinois and Pennsylvania also use this method. *See id.* at 3 n.20.
48. RUNNING FOR JUDGE, *supra* note 17, at 11.
49. American Judicature Society, History of Reform Efforts: Unsuccessful Reform Efforts, *supra* note 9.
50. *Id.*
51. Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL'Y 67, 77–78 (2009).
52. *Id.* at 78.
53. *See* American Bar Association, Fact Sheet on Judicial Selection Methods in the States, http://www.abanet.org/leadership/fact_sheet.pdf (last visited Nov. 30, 2010).
54. California, Maine, New Jersey, South Carolina, and Virginia. *See* American Judicature Society, Methods of Judicial Selection: Selection of Judges, *supra* note 7.
55. Alaska, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Rhode Island, Utah, Vermont, and Wyoming. *See id.*
56. Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee. *See id.*
57. Alabama, Illinois, Louisiana, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia. *See id.* Ohio presents somewhat of a hybrid situation by using partisan primary elections and nonpartisan general elections. *Id.* Also, several states that use the election method fill interim vacancies through a merit-selection process. *E.g.*, American Judicature Society, Methods of Judicial Selection: New Mexico, http://www.judicialselection.us/judicial_selection/methods/selection_of_Judges.cfm?state=NM (last visited Nov. 30, 2010).
58. Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin. *See* American Judicature Society, Methods of Judicial Selection: Selection of Judges, *supra* note 7.
59. Only Virginia and South Carolina are selected by the legislature. *Id.*
60. Hon. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1429 (2001) ("Judicial retention elections have been part of the selection and retention process in many states for over thirty years. Twenty states use some form of judicial retention election for appellate court judges and justices, and twelve states use retention elections for at least some of their trial court judges.").
61. R.I. CONST. art. X, § 5.
62. *E.g.*, COLO. CONST. art. VI, § 23 (age 72); MASS. CONST. pt. 2, ch. III, art. I (age 70); N.H. CONST. pt. 2, art. 73, 78 (age 70); OHIO CONST. art. IV, § 6 (age 70); *see also* Vermont Legislative Research Shop, The University of Vermont, Mandatory Retirement Age of Judges (Apr. 5, 2000), http://www.uvm.edu/~vlrs/doc/mandatory_retirement_age_of_judg.htm.
63. Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, New Mexico, North Dakota, Oregon, Vermont, Virginia, Washington. *See* Vermont Legislative Research Shop, *supra* note 62.
64. California, Illinois, Kentucky, Maine, Missouri, Montana, Nebraska, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, Utah, West Virginia, and Wisconsin. *See id.*

**[E]ven in the years prior to *White*, judges were challenging disciplinary actions and bringing lawsuits related to judicial campaign activity with varying outcomes.**

ment provision in Missouri's Constitution, resulting in the U.S. Supreme Court case *Gregory v. Ashcroft*.[65] The Court, with Justice O'Connor writing for the majority, held that (1) appointed Missouri state judges constitute appointees "on a policymaking level," and were thus excluded from protection under the Federal Age Discrimination in Employment Act, and (2) the Missouri Constitution's mandatory retirement provision did not violate the Equal Protection Clause.[66]

### B. The Catalysts for the Current Debate

The current momentum for the debate may be attributed to several factors. First, there has been a profusion of cases brought by judges across the country regarding judicial campaign activity, culminating in two U.S. Supreme Court decisions: *Republican Party of Minnesota v. White* and *Caperton v. A.T. Massey Coal Co.*[67] Further, the U.S. Supreme Court recently decided *Citizens United v. Federal Election Commission*,[68] which may impact judicial campaign contributions. Lastly, the current debate may also be attributed to the rising rate of judicial campaign contributions and polls indicating public dissatisfaction with the judiciary as a whole.

#### 1. RECENT UNITED STATES SUPREME COURT CASES

##### a. *Republican Party of Minnesota v. White*

The question presented in *White* was whether the First Amendment permitted the Minnesota Supreme Court to prohibit candidates for judicial election "from announcing their views on disputed legal and political issues."[69] The judge in question, in the course of his nonpartisan campaign, "distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion."[70] Minnesota's Code of Judicial Conduct, Canon 5(A)(3)(d)(i), featured an "announce clause," restricting a candidate for judicial office from announcing his or her views on disputed legal issues.[71] This Minnesota code provision was based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct.[72] The U.S. Supreme Court concluded that the provision infringed on a judge's right to free speech.[73] As a result of the *White* decision, elected judges, unlike appointed and merit-selected judges, have brought a myriad of First Amendment free speech challenges related to campaign activity, some finding success, while others did not.[74] The *White* decision also had implications outside the context of announce clauses. For example, the U.S. District Court for the District of North Dakota struck down a clause restricting judges from making pledges or promises regarding certain legal issues, relying on *White*.[75]

But even in the years prior to *White*, judges were challenging disciplinary actions and bringing lawsuits related to judicial campaign activity with varying outcomes. These judges argued First Amendment free speech violations mostly related to judicial campaigns under the 1990 ABA Model Code of Judicial Conduct, preventing a judicial candidate from making "pledges, promises, or commitments" with respect to cases, controversies, or issues likely to come before the court.[76] The actions ranged from a successful challenge to Florida's Canon 7B(1)(c), which prohibited discussion of "disputed legal or political issues,"[77] to an unsuccessful challenge to Kentucky's Canon 7B(1)(c), where the Kentucky Supreme Court held that "there is a compelling state interest in so limiting a judicial candidate's speech, because the making of campaign commitments on issues likely to come before the Court tends to undermine the fundamental fairness and impartiality of the legal system."[78] These two decisions dealt with similar issues but reached opposite results. Several First Amendment challenges also arose outside of the context of commenting on legal issues likely to come before the court. These challenges covered issues such as: statements relating to conduct in office,[79] candidate questionnaires,[80] and the accuracy of campaign statements.[81] These types of challenges also had varying outcomes. In the federal arena, courts have tended to strike down restrictions on both

65. 501 U.S. 452 (1991).
66. *Id.* at 467, 473.
67. 536 U.S. 765 (2002); 129 S. Ct. 2252 (2009).
68. 130 S. Ct. 876 (2010).
69. *White*, 536 U.S. at 768.
70. *Id.* at 768–69.
71. *Id.* at 768.
72. *Id.*
73. *Id.* at 788.
74. *See* O'Neill v. Coughlan, 511 F.3d 638 (6th Cir. 2008) (court abstained from reaching the merits); Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224 (6th Cir. 2004) (successful); Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65 (2nd Cir. 2003) (court abstained from reaching the merits); Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) (successful); Smith v. Phillips, No. CIV.A.A-02CV111JRN, 2002 WL 1870038 (W.D. Tex. Aug. 6, 2002) (successful); *In re* Kinsey, 842 So. 2d 77 (Fla. 2003) (unsuccessful); *In re* Dunleavy, 838 A.2d 338 (Me. 2003) (unsuccessful); *In* re Raab, 793 N.E.2d 1287 (N.Y. 2003) (unsuccessful); *In re* Watson, 794 N.E.2d 1 (N.Y. 2003) (unsuccessful).
75. N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1039–41 (D.N.D. 2005).
76. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (1990).
77. ACLU of Fla., Inc. v. The Fla. Bar, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (explaining that "a person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office"); *see also* JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS 11-14 to 11-15 (4th ed. 2007).
78. Ackerson v. Ky. Judicial Ret. & Removal Comm'n, 776 F. Supp. 309, 314 (W.D. Ky. 1991); *see also* ALFINI ET AL., *supra* note 77, at 11-17.
79. *See, e.g.*, *In re* Kaiser, 759 P.2d 392 (Wash. 1988).
80. *See, e.g.*, Pittman v. Cole, 267 F.3d 1269 (11th Cir. 2001).
81. *See, e.g.*, *In re* Bybee, 716 N.E.2d 957 (Ind. 1999); *In re* Donohoe, 580 P.2d 1093 (Wash. 1978).

campaign statements and a judge's ability to respond to questionnaires, relying on First Amendment grounds.[82]

The repercussions from the *White* decision took several forms: states repealed their announce clauses,[83] issued advisory opinions,[84] or declared that *White* did not affect their codes;[85] judicial ethics commissions dismissed proceedings against judges;[86] and judges commenced constitutional challenges.[87] As evidenced by the extensive commentary regarding *White*,[88] the Supreme Court's decision has done little to settle what is and what is not protected judicial campaign speech. Ethics advisory committees and disciplinary bodies continue to enforce restrictions on judicial speech as long as the restrictions are narrowly tailored and differ from the restrictions struck down in *White*.[89] The 2007 ABA Model Code of Judicial Conduct ("2007 Code") takes a similar approach.[90] As a result of *White*, the ABA added five comments to Rule 4.1 in the 2007 Code (paragraphs 11 through 15) that discuss the distinctions between various "announce clauses."[91] Although the 2007 Code offers a better definition of acceptable campaign speech, not all of the states have adopted the Code in toto.[92] While the *White* decision addressed a candidate's political speech during his or her own judicial campaign, it did not address free speech regarding a judge's personal involvement in political activities outside of their own judicial campaign. Thus, it is quite possible that the *White* decision will spark a flurry of new cases.[93] However, according to some scholars, the fear that the *White* decision would result in "rancorous free-for-alls" has not been realized.[94]

**b. *Citizens United v. Federal Election Commission***

Another important U.S. Supreme Court case involving free speech is *Citizens United v. Federal Election Commission*.[95] While the issue in *White* related to judges' freedom of speech, the issue in *Citizens United* related to the free speech of a campaign supporter in a presidential election. In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary critical of then-Senator Hillary Clinton, a candidate for her party's presidential nomination.[96] Citizens United was poised to pay a cable television company to carry the documentary through video-on-demand during the 30 days prior to primary elections.[97] There was a concern, however, that such action would violate the Bipartisan Campaign Reform Act (BCRA), which prohibits corporations from spending general treasury funds on "electioneering communications"—defined as "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election."[98] Thus, Citizens United sought declaratory and injunctive relief against the Federal Election Commission.[99]

**Citizens United may impact judicial campaigns in election states because corporate expenditures are now unlimited.**

The U.S. Supreme Court, in a controversial 5 to 4 decision, overruled *Austin v. Michigan Chamber of Commerce*, holding that the "Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."[100] The Court struck down the portion of the BCRA that prohibited all corporations, both for-profit and not-for-profit, and unions from broadcasting electioneering communications, and thus also overruled a portion

82. ALFINI ET AL., *supra* note 77, at 11-13.
83. Missouri repealed its announce clause, Louisiana and Texas amended their judicial codes. JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR ASS'N, BACKGROUND PAPER, http://www.abanet.org/judicialethics/about/background.html (last visted Dec. 3, 2010).
84. Ohio. *Id.*
85. Kentucky, Florida, and Georgia. *Id.*
86. California. *Id.*
87. *E.g.*, Wersal v. Sexton, 613 F.3d 821, 826 (8th Cir. 2010) ("[Plaintiff] now maintains that the amendments to [Minnesota's] solicitation clause do not cure its invasion of his First Amendment rights, and that the endorsement clause improperly restricts expression protected by the First Amendment."); *see also* ALFINI ET AL., *supra* note 77, at 11-18 ("Unfortunately, the Court's decision in *White* . . . has spawned a number of conflicting lower Court decisions and widely divergent attempts to conform state judicial ethics provisions to *White*.").
88. *See* ALFINI ET AL., *supra* note 77, at 11-18 n. 95 (collecting various sources).
89. *See* Cynthia Gray, *The States' Response to* Republican Party of Minnesota v. White, 86 JUDICATURE 163, 163 (2002).
90. ALFINI ET AL., *supra* note 77, at 11-18.
91. MODEL CODE OF JUDICIAL CONDUCT Rule 4.1 (2007).
92. As of June 18, 2009, 33 states plus the District of Columbia created committees to review the 2007 Code; 8 of those states adopted the Code in whole or in part, 7 states merely made revisions to their existing codes, and the committees in the other 18 states plus the District of Columbia had yet to complete their reviews. REPORT TO THE COURT OF APPEALS OF MARYLAND OF THE MARYLAND COMMITTEE TO REVIEW THE 2007 CODE OF JUDICIAL CONDUCT PROPOSED BY THE AMERICAN BAR ASSOCIATION 3 (June 18, 2009), *available at* http://www.courts.state.md.us/publications/pdfs/aba-report.pdf.
93. *E.g.*, *In re* Hecht, 213 S.W.3d 547 (Tex. Spec. Ct. Rev. 2006). For a comprehensive discussion on similar cases brought both prior to and subsequent to the *White* decision, see ALFINI ET AL., *supra* note 77, at ch. 11. *See also* Nevada Standing Committee on Judicial Ethics and Election Practices, Advisory Op. JE10-005 (Aug. 2, 2010) (discussing the propriety of a judge conducting an event for another political candidate in his own home), *available at* http://judicial.state.nv.us/JE10-005.pdf.
94. Posting of Brandon Bartels to Bright Ideas, Empirical Analysis of Law, Politics, http://www.concurringopinions.com/archives/2010/06/bright-ideas-political-scientists-chris-w-bonneau-and-melinda-gann-hall-on-the-judicial-elections-controversy.html (June 17, 2010, 6:41 EST).
95. 130 S. Ct. 876 (2010).
96. *Id.* at 887.
97. *Id.* at 887–88.
98. *Id.*
99. *Id.* at 888.
100. *Id.* at 886.

**While *Citizens United* may indirectly impact all judicial campaigns, *Caperton* will have a more direct effect.**

of *McConnell v. Federal Election Commission*, which upheld the same provision.[101] This holding was based in part on the fact that the BCRA's prohibition on electioneering communications was an "outright ban on speech, backed by criminal sanctions."[102]

It is comprehensible that *Citizens United* may impact judicial campaigns in election states because corporate expenditures are now unlimited. Although some scholars see *Citizens United* as "another tool for condemning" judicial elections,[103] this case may also impact retention elections in merit-selection states. A judge in an election state is cognizant of the need to raise funds and run a campaign. In a retention election, however, the judge may be totally unaware of the need to raise funds or campaign until it is too late. Campaigning is not at the core of the merit method as it is with the judicial-election method; in fact, that is the principal distinguishing factor between the two. Typically, a judge in a merit-selection state cannot even lodge a retention campaign unless there is "active opposition."[104] One need not even fashion a hypothetical scenario to make the point. Currently in Colorado there is a somewhat active group of individuals called "Clear the Bench," composed of a few state lawmakers and others who sought to vote out three Colorado Supreme Court Justices based upon some of their more controversial decisions.[105] Unlike the organized 1996 campaigns of Supreme Court Justice Lanphier and the group opposing him—the first Supreme Court Justice in Nebraska history not to be retained by the voters[106]—even at the latest stages of the election cycle, other than some articles and editorials, there were no known monetary expenditures by Clear the Bench in Colorado. In a recent ruling, however, a state court required the group to register as a political committee which means that they can only accept donations under $525.00 per donor.[107] None of the three Colorado Supreme Court Justices up for retention engaged in any campaign efforts. There was also a recent, successful effort in Larimer County, Colorado to oust two state court judges for their actions as former prosecutors, where the judges received an advisory opinion allowing them to publicly respond to the opposition.[108] The most recent attempt to oust merit-selected judges occurred in Iowa, where the National Organization for Marriage spent $230,000 on television ads criticizing three state supreme court justices for their ruling in a same sex marriage case.[109] Consider what would happen if a group seeking to oust a merit-selected judge or justice received a large corporate donation and waited until immediately prior to the retention vote to usher in a tremendous statewide campaign? The judge or justice will be ill-prepared, unfunded, and without an advisory opinion permitting response; in other words, they will be "sitting ducks." In this sense, *Citizens United* may have an affect on retention elections in merit-selection states.

**c. *Caperton v. A.T. Massey Coal Co.***

While *Citizens United* may indirectly impact all judicial campaigns, *Caperton* will have a more direct effect. In *Caperton*, the United States Supreme Court held that a justice's failure to recuse himself when a campaign contributor appeared in his court violated the Due Process Clause of the 14th Amendment.[110] Prior to this case, contributions by persons or groups who represented a particular point of view, such as opposition to abortion or to capital punishment, were not precluded from making donations to judicial campaigns, but there was always a concern that significant public attention would lead to perceptions of favoritism.[111] *Caperton* held that such perceived favoritism might be so great as to require mandatory judicial recusal based on constitutional concerns.[112] Although the circumstances in *Caperton* involved judicial campaign contributions, this case has implications for any type of perceived judicial favoritism.

In December 2009, "Michigan's Supreme Court issued new rules making it harder for justices to hear cases involving major campaign supporters,"[113] and "Wisconsin became the third state to provide public financing for appellate court races,

101. *Id.* at 913.
102. *Id.* at 897.
103. Bartels, *supra* note 94.
104. *See, e.g.*, ALASKA CODE OF JUDICIAL CONDUCT Canon 5C(2); COLO. CODE OF JUDICIAL CONDUCT Canon 7B(2); IOWA CODE OF JUDICIAL CONDUCT Canon 7B(2).
105. Clear The Bench Colorado, http://www.clearthebenchcolorado.org/ (last visited Dec. 6, 2010). This group's efforts failed, as all three justices were retained. Post of Matt Masich to Law Week Colorado, http://www.lawweekonline.com/2010/11/colo-supreme-court-justices-retained/ (Nov. 3, 2010).
106. American Judicature Society, Judicial Selection in the States: Nebraska, http://www.judicial selection.us/judicial_selection/index.cfm?state=NE (last visited Dec. 6, 2010).
107. John Tomasic, *Clear the Bench Ruling Limits Donations in Key Weeks Before Election*, THE COLORADO INDEPENDENT, September 27, 2010.
108. Colo. Judicial Ethics Advisory Bd., Opinion 2010-03 (Sept. 29, 2010). These two judges were ousted. Pamela Dickman, *Larimer Judges' Ouster Nearly Unprecedented: Public Campaign Against Judicial Retention Rare*, REPORTERHERALD.COM, Nov. 4, 2010, http://www.reporterherald.com/news_story.asp?ID=30020.
109. A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions*, N.Y. TIMES, Sept. 24, 2010, *available at* http://www.nytimes.com/2010/09/25/us/politics/25judges.html. All three Iowa Supreme Court Justices were ousted. Jason Hancock, *Iowa Ousts Three Supreme Court Justices, Sets Stage for Push to Overturn Gay Marriage*, THE MINNESOTA INDEPENDENT, Nov. 3, 2010, *available at* http://minnesotaindependent.com/73736/iowa-ousts-three-supreme-court-justices-sets-stage-for-push-to-overturn-gay-marriage.
110. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256–57, 2265 (2009).
111. ALFINI ET AL., *supra* note 77, at 11-58 to 11-59.
112. *Caperton*, 129 S. Ct. at 2265.
113. Press Release, Justice at Stake Campaign, Citizens United Called Grave Threat For America's Courts (Jan. 22, 2010) http://www.justiceatstake.org/newsroom/press_releases.cfm/citizens_united_called_grave_threat_for_americas_courts?show=news&newsID=6669.

so that judicial candidates would not have to seek money from those appearing before them in court."[114] In contrast, the next month, the Wisconsin Supreme Court was seeking to finalize a proposed order that said judicial campaign contributions do not require judges to step aside from hearing cases involving a supporter.[115]

### d. *Collective Implications of White, Citizens United and Caperton*

When one begins to apply these three cases collectively to a judicial campaign and election, things become convoluted. Consider a scenario where a judge receives a campaign contribution from an oil and gas corporation or an anti-abortion nonprofit corporation by virtue of a cable advertisement for the judge or against his opponent. Under *Citizens United*, in those states without contribution limits, the corporation may now expend an unlimited amount of advertising funds on behalf of a judge. Additionally, that judge, under his exercise of free speech rights as enunciated in *White*, may now openly state his opposition to the use of alternative energy or abortion. But one obstacle standing in the way of perceived or real judicial partiality is *Caperton*. Under these circumstances a *Caperton* argument would most likely result in the judge's recusal from the case. But what happens under the same scenario when a different corporation with the exact same views as the contributing corporation comes before the judge? While the judge may recuse on the basis of a perceived partiality, there is no mandate for him to do so under *Caperton*. There is now a concern over the influence of politics in judicial elections as a result of of *White*, which permits judicial candidates to discuss their positions on various legal issues while campaigning, including issues that may come before them for decision.[116] In response to *White*, the Missouri Supreme Court repealed their announce clause, stating that "[r]ecusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct."[117]

### 2. INCREASED EXPENDITURES IN JUDICIAL ELECTIONS

Even before *Citizens United*, private contributions to judicial campaigns were beginning to skyrocket and were playing a major role in the success or defeat of a judge running for a seat on the bench: "In the 2000, 2002 and 2004 election cycles, candidates raised $123 million compared with only $73.5 million in the preceding three cycles."[118] In a particularly astounding example, a group in West Virginia "raised at least $3.6 million to successfully beat an incumbent."[119] Similarly, the 2004 contest between Lloyd Karmeier and Gordon Maag, two Illinois Supreme Court candidates, raised almost $9.4 million, nearly double the previous national record.[120] That amount topped the money raised in 18 of 34 U.S. Senate races decided that year.[121] One could foresee these situations giving rise to backlash against a corporation for funding a judicial candidate, not unlike those typical to political campaigns. For example, in Minnesota, Target Corporation's donation to a group that supported the gubernatorial candidate Tom Emmer has received harsh press from a variety of groups.[122]

**Consider a scenario where a judge receives a campaign contribution from an oil and gas corporation or an anti-abortion nonprofit corporation by virtue of a cable advertisement for the judge or against his opponent.**

Fortunately, there are some small restrictions in the judicial campaign arena under both the 1990 and 2007 ABA Codes. Judicial candidates may promote their campaigns through advertisements under Canon 5C(1)(b)(ii) of the 1990 Code and Rule 4.2(B)(2) of the 2007 Code, with some restrictions related to the content.[123] A judge engaged in judicial campaigns may also accept contributions. The financing of a judicial campaign is governed by Canon 5C(2) of the 1990 Code, which requires a candidate to create campaign committees, and Rule 4.1(A)(8) of the 2007 Code, which does not.[124] Who may be on those committees and who may chair those committees varies from state to state.[125] There are also constraints on the solicita-

114. *Id.*
115. Patrick Marley, *Proposed Order on Judicial Donations Remains up for Debate*, JOURNAL SENTINEL (Milwaukee), Jan. 18, 2010, *available at* http://www.jsonline.com/news/statepolitics/82010232.html.
116. *See* Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2179 (2006) (asserting that all the Justices in *White* assumed that "[c]andidates for judicial office will find themselves under an obligation of some sort to speak out on controversial issues once they are liberated to do so, while nominees for judicial office will not"). *But see* Geoffrey C. Hazard Jr., *"Announcement" By Federal Judicial Nominees*, 32 HOFSTRA L. REV. 1281, 1287 (2004) (asserting that the decision in *White* is not limited to elected judges, and that it affords appointed judges the same right to engage in political speech).
117. *In re* Enforcement of Rule 2.03, Canon 5.B(1)(c) (Mo. 2002) (en banc).
118. RUNNING FOR JUDGE, *supra* note 17, at 1; *see also* DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004 vii (June 2005), *available at* http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf.
119. RUNNING FOR JUDGE, *supra* note 17, at 1.
120. GOLDBERG ET AL., *supra* note 118, at 14–15.
121. Adam Skaggs, *Judging For Dollars*, THE NEW REPUBLIC, Apr. 3, 2010, *available at* http://www.tnr.com/article/politics/judging-dollars.
122. *E.g.*, Amanda Terkel, *Target Donates $150K To Group Supporting Candidate Who Wants To Cut Waiters' Minimum Wage*, THINK PROGRESS, July 27, 2010, http://thinkprogress.org/2010/07/27/target-emmer-donate/.
123. ALFINI ET AL., *supra* note 77, at 11-38.
124. *Id.* at 11-40.
125. *Id.*

**Polling data . . . demonstrates the concern over the potential impact on the courts from special interest money.**

tion of funds by those judicial campaign committees, and these too vary from state to state.[126] Further, each state permits solicitation within various time limits,[127] as the 2007 Code also leaves the solicitation time limits to each state.[128] The effectiveness of these model codes, however, is limited by the fact that not all of the states have adopted all of the code provisions.

### 3. PUBLIC DISSATISFACTION WITH THE JUDICIARY

Polling data that includes voters, business leaders, and judges themselves demonstrates the concern over the potential impact on the courts from special interest money. For example, 78% are very or somewhat concerned that judicial candidates must, among other things, raise more money and 79% of business leaders believe that contributions made to judicial campaigns have some influence on judges' decisions.[129] Further, more than 90% of the individuals polled believe that "judges should not hear cases involving individuals or groups that contributed to their campaign."[130] All of the public dissatisfaction with the judiciary, however, is not based solely on the conduct of judges in judicial elections. For example, even in merit-selection states, where there are no campaigns or campaign contributions, "the national trends in political trust of the judiciary in the last two decades are found to be reflected in the trends in the reported declines in the affirmative retention vote."[131] The American Judges Association White Paper entitled *Procedural Fairness: A Key Ingredient in Public Dissatisfaction* stated that "Americans are highly sensitive to the processes of procedural fairness. It is no surprise, then, that the perception of unfair or unequal treatment 'is the single most important source of popular dissatisfaction with the American legal system.'"[132]

## III. THE DEBATE

As one scholar noted, "it is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the last 50 years as the subject of judicial selection."[133] There has been a continuum of associations, organizations, and individuals involved in the debate, all supporting various selection methods. In the past, these entities have included the League of Women Voters, Democracy South, the Institute on Money in State Politics, and the American Judicature Society—as the initiator of the merit method and its ardent supporter. Today, the American Judicature Society is still active in the debate, and is joined by the Brennan Center, the ABA, the Justice at Stake Campaign, a few state supreme court justices from around the country,[134] and the Institute for Advancement of the American Legal System, lead by Justice O'Connor. Although the Conference of Chief Justices recognized the "hazards" of partisan judicial elections,[135] it ultimately labeled partisan elections a "reasonable, constitutionally defensible method."[136] The National Center for State Courts has remained neutral on the matter.[137] Various academics and commentators are divided, with some supporting judicial elections, allowing each constituent the opportunity to exercise his or her democratic vote, while others back a merit selection process, contending it insulates judges from politics.

The basis for three of the major movements and methods has lived on as part of the debate, as the proponents of judicial elections continue to argue that elections hold judges accountable to the public. The arguments, in their most basic terms, break down to "judicial accountability" through the election process, and "judicial independence" via merit-based selection.[138] Electing judges is seen as consistent with our democratic ideals; allowing voters to decide maintains the independence of the judicial branch by taking appointment influence away from the other two branches.[139] If the voters feel a particular judge is not doing his or her job properly, they can vote the judge out at the next election or, in some states, request a

126. *Id.* at 11-50.
127. *Id.*
128. MODEL CODE OF JUDICIAL CONDUCT Rule 4.4(B)(2) (2007).
129. Justice at Stake Campaign, Polls, http://www.justiceatstake.org/resources/polls.cfm (last visited Dec. 6, 2010).
130. *Id.*
131. Larry T. Aspin & William K. Hall, *Political Trust and Judicial Retention Elections*, 9 LAW & POL'Y 451 (1987)
132. Hon. Kevin Burke & Hon. Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 4, 4 (2007) (quoting Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 517 (2003)).
133. Phillip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 31 (1986).
134. For example, the Arizona Supreme Court's Chief Justice Ruth McGregor and Justice Andrew Hurwitz support merit selection. Thomas Mitchell, *Surrending Our Franchise to Directly Elect Our Judges*, LAS VEGAS REVIEW JOURNAL, Sept. 26, 2010; *Justice Respectfully Disagrees with Robb*, THE ARIZONA REPUBLIC (Phoenix), Oct. 27, 2009. The Wisconsin Supreme Court's Chief Justice Shirley Abrahamson and the Arkansas Supreme Court's Justice Robert Brown support judicial elections. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 975–76 (2001); Justice Robert L. Brown, *Non-partisan Elections*, ARK. LAW., Winter 1999, at 12.
135. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1089 (2007).
136. *Id.* (internal citations omitted).
137. Statement of Jesse Rutledge from the National Center for State Courts (May 21, 2010).
138. F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 211 (1999) (noting that "when Americans want to make their judges independent they appoint them and when they wish instead to make them accountable they elect them").
139. *See* Selection of State Judges Symposium Transcripts, *Appointment Versus Election: Balancing Independence and Accountability*, 33 U. TOL. L. REV. 287, 301 (2002).

recall election.[140] Supporters of the election system maintain that election allows for less partisanship than appointment.[141] Selecting judges through elections, however, requires candidates to campaign, ultimately involving speeches, debates, and raising campaign funds, making judicial elections more like legislative elections.[142] Opponents of judicial elections note that large donations from certain special interest groups or even other lawyers can lower public confidence in the judiciary and potentially improperly influence a judge's impartiality in his or her decisions.[143] Elections are also viewed as part of a political process, while judges are expected to be insulated from politics. The basic idea behind elections—government by the people—conflicts with the notion that judges are not supposed to be influenced by the public's will.[144]

On the other hand, supporters of merit-selection systems emphasize how this model creates judicial independence.[145] Merit-based appointments separate the judicial branch from politics and other possible outside influences.[146] Backers of merit-based selection assert that the process ensures that the most qualified and competent candidates are selected.[147] Generally, candidates are evaluated by lawyers, rather than the public, who are arguably better suited to assess a candidate's relevant qualifications.[148] Many states that use merit selection also have evaluation systems or retention elections in place to assure accountability.[149] Additionally, merit-selection proponents purport that this mode of selection increases the number of minorities serving as judges and resolves the problem of voter apathy.[150] But Chris Bonneau, a noted expert in judicial selection, suggests that voters are not apathetic, that they do indeed turn out for competitive judicial elections and that they are able to distinguish between candidates with prior judicial experience and those without prior judicial experience.[151]

**New Jersey's Republican Governor Chris Christie recently decided not to reappoint a Democrat to New Jersey's highest court.**

Supporters of the merit method also argue that judges who must campaign will be influenced by a campaign contributor's ideology. Some scholars, however, believe that an apolitical selection process is fiction and that judges are not mere technocrats.[152] In other words, they believe that the merit process is still politicized.[153] They maintain that the merit method may lead to appointments that further the interests of the elected official's political party since a politically elected figure, whether it is the governor or legislator, ultimately selects the judicial candidate.[154] For example, New Jersey's Republican Governor Chris Christie recently decided not to reappoint a Democrat to New Jersey's highest court.[155] Additionally, merit selection arguably erodes judicial accountability, making the appointed judges only answerable to fellow bar members or other community or political persons who helped to select them. Some even argue that most nominating commissions are attorney "centric," which further removes the public from the judicial selection process. Various other challenges have been raised against the merit selection sys-

140. *E.g.*, Cal. Const. art. II, § 14(b) ("Signatures to recall . . . judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office.).
141. *See* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev. 315, 332 (1999).
142. *See* Selection of State Judges Symposium Transcripts, *supra* note 139, at 289.
143. *See* Mears, *supra* note 10 (noting Ohio Chief Justice Thomas Moyer's opinion that campaign fundraising can diminish public confidence in the courts). In response to the possibility of improper influence, and the Supreme Court's ruling in *Caperton v. A.T. Massey Coal Co.*, the American Bar Association and the states have debated different standards for when judges are required to recuse themselves. *See* John Gibeaut, *Caperton Capers*, A.B.A. J., Aug. 2009, at 21.
144. *See* Chisom v. Roemer, 501 U.S. 380, 400–01 (1991) ("The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.").
145. *E.g.*, Carolyn B. Lamm, *Let's Leave Politics Out of It*, ABAJournal.com, Mar. 1, 2010, http://www.abajournal.com/magazine/article/lets_leave_politics_out_of_it/.
146. *See* Hanssen, *supra* note 138, at 211 (noting the "long-standing consensus that appointive procedures protect state judges from political influence more effectively than elective procedures").
147. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. Tex. L. Rev. 1197, 1209 (2000).
148. *See* Michael DeBow et al., The Federalist Society, The Case for Partisan Judicial Elections (Jan. 1, 2003) (discussing the view that lawyers bring expertise to nominating commissions), http://www.fed-soc.org/publications/PubID.90/pub_detail.asp.
149. *See, e.g.*, Iowa Judicial Branch, Judicial Retention Elections, http://www.iowacourts.gov/Public_Information/About_Judges/Retention/ (last visited Dec. 7, 2010).
150. Maute, *supra* note 147, at 1209.
151. Bartels, *supra* note 94.
152. *Id.*
153. *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 Fla. St. U. L. Rev. 1, 32 (1995) ("The forum for such political considerations has merely been shifted from the electoral arena to the commissions and the governor's mansion." (citations omitted)).
154. *Id.* at 32 n.218. ("While 'merit' systems limit the discretion of the governor regarding the choice of judges, the decision is still frequently based upon partisan political considerations because the individual appointed tends to be a member of the governor's party.").
155. *See* Terrence Dopp, *Christie May Be Blocked in Replacing New Jersey Justice Wallace*, Bloomberg Businessweek, May 3, 2010, http://www.businessweek.com/news/2010-05-03/christie-may-be-blocked-in-replacing-new-jersey-justice-wallace.html. Christie, the first Republican elected New Jersey governor since 1997, said he believes the panel has a history of "legislating from the bench," but declined to reference any specific decisions from the justice who was not reappointed. *Id.* The governor said he made the move to begin reshaping the seven-member court, which was made up of four Democrats, two Republicans and an Independent. *Id.*

**Some scholars believe that elective and appointive systems do not differ much in their actual operation.**

tem; for example, the Supreme Court of South Carolina recently denied a judge's challenge to South Carolina's merit-selection system based on a separation-of-powers argument.[156] In another example, the Ninth Circuit Court of Appeals dismissed a challenge to Alaska's merit-selection system on the basis that it violates the Equal Protection Clause.[157] In that case, the plaintiffs argued that because 3 of the 7 members of Alaska's nominating commission "are appointed by the Alaska bar association's Board of Governors, and because Alaska lawyers have a greater voice in the selection of the Board of Governors than non-lawyers, the state's non-lawyers are impermissibly denied an 'equal voice' in the selection of state court judges.'"[158]

Further, special interest groups can still play a role in merit-based selection if they have influence over members of the nominating commission or the judicial performance commissions who are typically political appointees.[159] These commissions change with party politics and may influence whether a retention recommendation is given to a judge. Ten states use judicial performance commissions, which survey individuals who have interacted with the judge to evaluate the judge's legal ability, integrity, communication skills, temperament, and administrative capacity.[160] One could imagine, however, scenarios where the data used in those commission surveys becomes misleading or flawed. Hypothetically, a judge may receive a "do not retain" recommendation from a commission with only five negative responses to a survey, where there were only ten total responses from a specific category of respondents, *i.e.* law enforcement. The commission may then state that 50% of that respondent category—law enforcement in this example—recommends that the judge not be retained. As a result, a mere five individuals may have the power to affect a judge's career. This is particularly troublesome in those states that have a mandatory threshold percentage to actually receive a "retain" recommendation from a commission. Additionally, there may be a disproportionate amount of responses in a given category that may also affect the judge's ratings. For example, if a judge is perceived to be defense oriented and he or she receives 100 responses from the general category of attorneys, only 20 of whom are defense attorneys and 80 of whom are prosecutors, the judge is unfairly penalized because the responses were not weighted.

While the debate over merit selection versus election ensues; no one seems to be proposing lifetime appointments as a method of judicial selection. But given the fact that the federal government and three states appoint judges without term limits, and the fact that judicial elections garner much disfavor due to judicial campaign activity,[161] the appointment method is now certainly worthy of entering the debate. This approach would be consistent with how judges were first selected in the U.S. and it would eliminate some of the concerns raised by the United States Supreme Court's decisions in *White*, *Caperton*, and *Citizens United*, in that it would extricate judges from *all* judicial campaign activity. The proponents of lifetime appointments argue that when judges are insulated from political activity, they become more impartial.[162] Opponents would argue that, similar to merit-based systems, unlimited tenure would diminish the democratic process by taking away the public's ability to vote in judicial elections. The opponents would also argue that, even worse than the merit-selection and retention system, unlimited tenure denies the public the chance to evaluate judges whatsoever—there would be no electoral mechanism for the removal of a judge, and thus judges would become less accountable to the public. Despite these concerns, every judge at every level in every state is always subject to a removal mechanism for cause.

The scholars, political scientists, experts in judicial selection, and professors in academia, take differing views on the subject. Some scholars believe that elective and appointive systems do not differ much in their actual operation.[163] This is due in part to the fact that "most incumbent judges are rarely opposed for reelection, and the overwhelming majority of judges who face the voters retain their seats."[164] But retention vote percentages have been diminishing over time.[165] Bonneau and Melinda Gann Hall, who are experts in the areas of judicial selection and politics, have empirically assessed and attempted to debunk many of the "reformers" arguments in their newly released book entitled *In Defense of Judicial Elections*.[166] These scholars believe that those promoting the merit method use only normative information in their arguments; contrastingly, these scholars use empirical information in an attempt "to elevate the discussion of judicial selection

156. Segars-Andrews v. Judicial Merit Selection Comm'n, 691 S.E.2d 453, 457 (S.C. 2010).
157. Kirk v. Carpeneti, 623 F.3d 889, 891 (9th Cir. 2010). The Plaintiffs have petitioned the Ninth Circuit for rehearing en banc. Brennan Center for Justice, Kirk v. Carpeneti, http://www.brennancenter.org/content/resource/kirk_v_carpeneti/ (last visited Dec. 7, 2010).
158. Brennan Center for Justice, Kirk v. Carpeneti, *supra* note 157.
159. *See* DEBOW ET AL., *supra* note 148; Maute, *supra* note 147, at 1209–10.
160. Alaska, Arizona, Colorado, Hawaii, Kansas, New Mexico, Missouri, Tennessee, Utah, and Vermont have this system. American Judicature Society, Methods of Judicial Selection: Retention Evaluation Programs, http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state= (last visted Dec. 13, 2010.)
161. Mears, *supra* note 10; Rizo, *supra* note 10.
162. *See, e.g.*, Croley, *supra* note 41, at 747 (stating that lifetime tenure can help avoid the "the biased administration of day-to-day justice. Judges who never have to seek or preserve electoral support have no incentive to please supporters").
163. Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 539–40, (2002).
164. *Id.*
165. *See, e.g.*, Charles Roos, Editorial, *Voter Distrust of Judges Goes Well Beyond Hufnagel*, ROCKY MTN. NEWS, Nov. 16, 1996, at 68A.
166. Bartels, *supra* note 94.

beyond the hyperbolic rhetoric."[167] They conclude that elections are the best way to select judges, though they acknowledge this method is not without its problems.[168]

## IV. CURRENT PROPOSALS FOR METHOD CHANGES AND WHY THEY FAIL

Kansas,[169] Ohio,[170] Minnesota,[171] Nevada,[172] West Virginia,[173] and Texas,[174] have either tendered a proposal or are considering changing from the election system to the merit selection and retention system, or vice versa. Ironically, in Missouri, a state whose name is synonymous with merit selection—*i.e.* "the Missouri Plan"[175]—there was an unsuccessful proposal to move from the traditional merit selection plan, through a nominating commission, to selection directly by the governor subject to confirmation by the senate.[176]

Some scholars, coined the "standard account" scholars, believe that the selection methods are chosen based upon society's responses to popular ideas at different historical periods.[177] But other scholars believe that methods are changed and modified based upon the bargaining processes among relevant political actors, which include their preferences at the moment and their future political circumstances.[178] For example, which method prevails is directly related to whether the political actors believe that they will remain in power and have an obliged judiciary.[179] These scholars would also argue that the Jackson Democracy Movement was due to the nation's lawyers seeking prestige as potential judges and not because of societal sentiment.[180] These scholars have supported their position with empirical data.[181]

**the reason proposals for changes in these methods fail or succeed is influenced by cultural and socio-political considerations.**

The reason proposals for changes in these methods fail or succeed is influenced by cultural and socio-political considerations. According to sociologist Ann Swidler, culture is like a "tool kit" that people may use "to solve different kinds of problems."[182] A change in method could create "culture shock," which "grows out of the difficulties in assimilating the new culture, causing difficulty in knowing what is appropriate and what is not."[183] Consider as an example if the judges, lawyers, and the electorate in Colorado, a merit-selection state, or Louisiana, an election state, were suddenly required to switch to the other method. This would be tantamount to telling those judges and others that they now have to speak Chinese without having taken a course in the language. These judges are indoctrinated and inculcated into their state's existing selection method. Thomas Kuhn, in *The Structure of Scientific Revolutions*, argued "that people are unlikely to jettison an unworkable paradigm, despite many indications that the paradigm is not functioning properly, until a better paradigm can be presented."[184] If a better paradigm is presented and a change is accepted, the next step

167. *Id.*
168. *Id.*
169. Voters in two counties in Kansas—a hybrid state using both merit selection and election—rejected attempts to switch from merit selection to election for local trial judges. Justice at Stake Campaign, Election Results 2010, http://www.justiceatstake.org/state/judicial_elections_2010/election_results_2010.cfm (last visited Dec. 7, 2010).
170. There is a proposed 2011 ballot measure in Ohio that would create a bipartisan selection panel that recommends candidates to the governor. Ballotpedia, Ohio 2011 Ballot Measures, http://www.ballotpedia.org/wiki/index.php/Ohio_2011_ballot_measures (last visited Dec. 7, 2010).
171. Minnesota was unable to put a ballot measure on the 2010 ballot for a creation of a selection panel that would recommend candidates to the governor for judicial appointment. Ballotpedia, Minnesota 2010 Ballot Measures, http://ballotpedia.org/wiki/index.php/Minnesota_2010_ballot_measures (last visited Dec. 8, 2010).
172. In the November 2, 2010 election, Nevada voters rejected a proposal to replace judicial elections with a merit-selection system. Ballotpedia, Nevada Judicial Appointment Amendment, Question 1, http://ballotpedia.com/wiki/index.php/Nevada_Judicial_Appointment_Amendment,_Question_1_(2010) (last visited Dec. 8, 2010).
173. West Virginia Governor Joe Manchin introduced two judicial reform bills in 2010, "the first of the two bills is a public financing pilot project for the two state Supreme Court seats up for grabs in the 2012 election. The second bill would create a judicial advisory committee to aid the governor in the selection of judges for circuit court vacancies." Chris Dickerson, *Manchin Has Two Judicial Reform Bills*, LEGALNEWSLINE.COM, January 14, 2010, http://www.legalnewsline.com/news/224992-manchin-has-two-judicial-reform-bills.
174. "Recent reform efforts have failed to get through the Legislature so Texans can vote on changing the system. A state constitutional amendment would be needed to enact this reform. Lawmakers should try again next year. Competent and impartial justice with minimal political interference is a goal worth pursuing." B. Davidson, *Bexar Partisan Sweep Highlights Need for Judicial Reform*, SAN ANTONIO EXPRESS, Nov. 3, 2010, http://www.mysanantonio.com/opinion/bexar_partisan_sweep_highlights_need_for_judicial_reform_106645368.html?c=y&page=2#storytop. No statewide ballot measures on this topic made it to the ballot. Eagle Forum, Election Guide–Texas, http://eagleforum.www.capwiz.com/election/guide/tx (last visted Dec. 8, 2010).
175. The Missouri Bar, History of Merit Selection, *supra* note 45.
176. Ballotpedia, Missouri Judicial Selection Amendment, http://ballotpedia.org/wiki/index.php/Missouri_Judicial_Selection_Amendment_(2010) (last visited Dec. 8, 2010).
177. EPSTEIN ET AL., *supra* note 4, at 4.
178. *Id.*
179. *Id.*
180. *Id.* at 9.
181. *Id.* at 20.
182. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273, 273 (1986).
183. Harvard International Office, Adjusting to a New Culture and Country, http://www.hio.harvard.edu/settlinginatharvard/orientation/adjustingtoanewculture/ (last visited Dec. 8, 2010).
184. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996).

**[A] logical choice for states might be to replace prohibitions and limitations on corporate spending with public financing for judicial campaigns. Some states seem to be moving in this direction . . . .**

would be to implement a change management component.[185]

## V. INTERIM REMEDIES

### A. Campaign Finance and Public Finance Laws

Prior to *Citizens United*, 24 states had laws banning or severely limiting corporate electioneering,[186] and 16 states either limited or completely banned corporate contributions to candidates.[187] The Supreme Court's decision in *Citizens United* will effect the removal of these corporate expenditure limits or bans. The National Institute on Money in State Politics noted the effect of the Court's decision:

> The "Citizens United v FEC" ruling by the U.S. Supreme Court has no effect on campaign limits in place at the state and federal levels but may effectively overturn laws in 24 states that ban or restrict corporations from funding [advocacy] for or against state candidates. In the 22 states that prohibit corporations from giving to candidates, individuals contributed about half of the money raised by candidates and non-individuals provided less than one-fourth. The reverse is true in the 28 states that allow corporate giving.[188]

Elected judges are generally subject to the same state campaign finance laws as other state officials unless there are stated exceptions for the judiciary, but even then the laws vary with the level and jurisdiction of the court.[189] There are seven states that specifically limit judicial campaign contributions.[190] One way to avoid the potential impact of *Citizens United* on judicial campaigns is to make a distinction between general elections, which was the concern in *Citizens United*, and judicial elections. The United States Supreme Court opinions are typically narrowly tailored and only apply to the facts of the case before it. Given this potential distinction, state prohibitions on corporate contributions to judicial elections might be upheld.

If such a distinction is not recognized, a logical choice for states might be to replace prohibitions and limitations on corporate spending with public financing for judicial campaigns. Some states seem to be moving in this direction,[191] and a few have already provided for public financing of judicial elections. In 2002, North Carolina passed the Judicial Campaign Reform Act, which provides for full public funding for state appellate and supreme court elections.[192] Similarly, in 2007, New Mexico amended their Voter Action Act to allow judicial candidates in contested primary and general elections for appellate and supreme court seats to opt for public financing.[193] In 2009, "Wisconsin passed a bill to curb the influence of special-interest spending in state Supreme Court elections by supporting qualifying candidates with taxpayer funding."[194] In West Virginia the legislature began a pilot program for public financing for judicial vacancies.[195] The Brennan Center for Justice at NYU School of Law,[196] the ABA, and the Committee for Economic Development all support full public financing of judicial elections as a way to prevent the perceived or real partiality that may be caused by campaign contributions to judicial elections.[197] Although public financing of campaigns is strictly voluntary, it has seen many success stories.[198]

Despite the fact that many favor public financing, there are

185. For an example of a change management model, see Change Management Learning Center, ADKAR Change Management Model Overview, http://www.change-management.com/tutorial-adkar-overview.htm (last visited Dec. 14, 2010).
186. Ian Urbina, *24 States' Laws Open to Attack After Campaign Finance Ruling*, N.Y. TIMES, Jan. 22, 2010, http://www.nytimes.com/2010/01/23/us/politics/23states.html?_r=1.
187. American Judicature Society, Judicial Campaigns and Elections: Campaign Financing, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state= (last visited Dec. 10, 2010).
188. DENISE ROTH BARBER, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, CITIZENS UNITED V. FEDERAL ELECTION COMMISSION (Mar. 2, 2010), http://www.followthemoney.org/press/ReportView.phtml?r=414.
189. National Center for State Courts, Judicial Selection and Retention FAQs, http://www.ncsc.org/topics/judicial-officers/judicial-selection-and-retention/faq.aspx (click on the hyperlink entitled "Where can I find information about campaign-finance law for elected state judicial officials?") (last visited Dec. 8, 2010).
190. Alaska, Idaho, Kansas, Missouri, Ohio, Texas, and Wisconsin. *Id.*
191. Neal Peirce, *Big Money, Attack Ads Infect Judicial Elections*, CITIWIRE.NET, Aug. 26, 2010, http://citiwire.net/post/2231/.
192. American Judicature Society, Judicial Campaigns and Elections: Campaign Financing, *supra* note 187.
193. Office of the New Mexico Secretary of State, Voter Action Act, http://www.sos.state.nm.us/temp.htm (last visited Dec. 8, 2010); *see also* N.M. STAT. ANN. § 1-19A-2, 3 (making public funding available to any "covered office," which is defined as "any office of the judicial department subject to statewide election").
194. Peter Hardin, *WI Senate Votes to Close 'Issue Ad' Loophole*, GAVEL GRAB, Jan. 19, 2010, http://www.gavelgrab.org/?p=7035.
195. *See* MALIA REDDICK, JUDGING THE QUALITY OF JUDICIAL SELECTION METHODS: MERIT SELECTION, ELECTIONS, AND JUDICIAL DISCIPLINE 1 (2010), http://www.ajs.org/selection/docs/JudgingQualityJudSelectMethods.pdf.
196. For a full discussion from the Brennan Center, see generally DEBORAH GOLDBERG, PUBLIC FUNDING OF JUDICIAL ELECTIONS: FINANCING CAMPAIGNS FOR FAIR AND IMPARTIAL COURTS (2002), http://www.brennancenter.org/dynamic/subpages/ji3.pdf.
197. AM. BAR ASSOC. STANDING COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 5 (2002), *available at* http://www.abanet.org/judind/pdf/commissionreport4-03.pdf.
198. Posting of Zachary Proulx to the Brennan Center for Justice blog, Also a Winner: Public Funding, http://www.brennancenter.org/blog/archives/also_a_winner_public_funding/ (Nov. 10, 2008).

cases challenging it on First Amendment grounds.[199] In a notable example, the United States Supreme Court recently granted certiorari over a First Amendment challenge to Arizona's public financing statute in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[200] In the meantime, however, *Citizens United* may pave the way for unbridled corporate contributions to judicial campaigns in states where there are no limits on corporate contributions to elections. But all of the concerns over campaign contributions to judicial campaigns may take a backseat if judges consistently perform well. As Judge Kevin Burke put it "the best anecdote or vaccine to all of the problems with the methods is consistently good performance by the courts. If there is public satisfaction with the 100 million cases heard each year, even Bill Gates won't be able to buy a judge."[201]

### B. Oversight Commissions

There has been a continuing call for the creation of judicial oversight commissions.[202] The oversight performed by such commissions ranges from judicial education programs to an examination of judicial codes. For example, in 2006, the Kentucky Judicial Campaign Conduct Committee was formed, an unofficial, non-partisan organization. The Committee's objectives include educating the public "about the important differences between judicial campaigns and campaigns for partisan political office," helping candidates "campaign in an ethical and dignified manner," monitoring advertising "to detect and deter improper campaigning," and investigating complaints "about unfair campaign tactics and [issuing] public statements about such tactics."[203] The committee also asks judicial candidates to sign a campaign pledge, which states that the candidate will conduct their campaigns in accordance with the Kentucky Code of Judicial Conduct.[204] The pledge further states that candidates will not engage in false or misleading advertising and will not make accusations that "impugn the integrity of the judicial system, the integrity of a candidate, or erode public trust and confidence in the independence and impartiality of the judiciary."[205] The National Center for State Courts recently added an Internet resource to aid those states that are contemplating the establishment of an oversight committee.[206] The ABA House of Delegates has also recommended campaign conduct committees.[207]

**The National Center for State Courts recently added an Internet resource to aid those states that are contemplating the establishment of an oversight committee [for judicial elections].**

### C. Mandatory Qualifications

While the merit method has minimum qualifications in place for judicial appointments by nomination commissions, elective states sometimes have little or no minimum qualifications for a judicial candidate.[208] This might result in a new attorney without any legal experience running against an incumbent judge. Those states that have election methods should consider creating or strengthening judicial qualifications. Another approach is to establish statewide systems of independent judicial qualification commissions who will be charged with identifying and encouraging potential candidates to run for judicial office. These commissions would evaluate the candidates to ensure that whoever is on the ballot is indeed qualified.[209]

### D. Better Voter Education and Awareness

There are some scholars who believe that the most important agent for change lies in educating the public about the work of judges.[210] To this end judges can increase their interaction with citizens and educate them about the judicial branch and the duties and obligations of a judge. But these outreach efforts need not be limited to judges. For example, "in Arizona and Missouri new 501(C)(3) organizations will work

199. Two lawsuits have challenged portions of Wisconsin's public financing statute in federal court. *See* Wis. Right to Life Political Action Comm. v. Brennan, 2010 WL 933809, at *1 (W.D. Wis. March 11, 2010); Koschnick v. Doyle, 2010 WL 897360, at *1 (W.D. Wis. March 11, 2010).
200. 2010 WL 3267528, at *1 (U.S. Nov. 29, 2010).
201. Statement of Judge Kevin S. Burke, Hennepin County District Court Judge, Minnesota.
202. *See, e.g.*, Louisiana Supreme Court, Louisiana Judicial Campaign Oversight Committee, http://www.lasc.org/judicial_campaign_oversight.asp (last visited Dec. 8, 2010); American Judicature Society, Judicial Campaigns and Elections: Campaign Oversight, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_oversight.cfm?state= (discussing the activities of campaign oversight committees in various states) (last visited Dec. 8, 2010); *see also* Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1458–62 (2001) (discussing campaign oversight efforts in Georgia, Michigan, Alabama, Ohio, and New York).
203. American Judicature Society, Judicial Campaigns and Elections: Campaign Oversight, *supra* note 202.
204. *See* Press Release, Kentucky Judicial Campaign Conduct Committee, Candidates Sign Campaign Conduct Pledge (Sept. 8, 2007), http://www.loubar.org/jccc/kjccchome.htm.
205. *Id.*
206. National Center for State Courts, Operating Effective Judicial Oversight Committees, http://www.judicialcampaignoversight.org/resourcecenter/index.html (last visited Dec. 8, 2010).
207. Schotland, *supra* note 135, at 1103.
208. For example, North Carolina, which elects their judges at every level, merely requires a candidate to be licensed to practice law. American Judicature Society, Methods of Judicial Selection: Selection of Judges, *supra* note 7.
209. *See* JUDITH S. KAYE, NEW YORK STATE UNIFIED COURT SYSTEM, THE STATE OF THE JUDICIARY 5 (2006), http://www.courts.state.ny.us/admin/stateofjudiciary/soj2006.pdf (discussing the merits of establishing a judicial qualification commission).
210. John D. Feerick, *Why We Seek Reform*, 34 FORDHAM URB. L.J. 3, 12 (2007).

**The presupposition of the debate is that everyone, including the judges themselves, want a judge to be a "good" judge, and each method claims to produce the best judges.**

directly on public education about courts and law."[211] Similarly, voter guides are utilized in both retention campaigns and election campaigns.[212] More states and local governments should consider these voter-education efforts.

### E. Extended Term Lengths

There are many benefits to lengthier judicial terms of office no matter what the selection and retention method. For the election method, a lengthier term means less campaigning and fundraising and therefore less pitfalls for judicial conduct violations.[213] It also allows the judge to focus on the bench matters as opposed to election matters.[214] In all systems, a lengthier term would make the position more appealing to potential judicial candidates and support more judicial independence.[215]

### F. Randomly Selected Citizen Commissions, Independent Paid Evaluators, Threshold Responses, Weighted Measurements, and Appeals Processes

The judicial-election method is not alone in needing some stopgap measures. There are inherent concerns with the merit-selection method: the risk that appointments to nominating commissions may be politicized, the attorney-centric composition of these commissions, and the potentially flawed methodology these commissions use to compile data on judges. To avoid the concern that politics and the bar influence commissions too greatly, states could form commissions in part by randomly selecting citizens from the rolls of registered voters from each congressional district. The remaining commission seats could be filled out with political appointments from categories such as higher education, labor, and of course, the law. This is the process used by the Washington Citizens' Commission on Salaries for Elected Officials, which oversees judges' salaries.[216] To address the data-compilation problem, a state might follow the lead of Alaska, which has a court-watcher program to evaluate judges.[217] Regarding concerns over the potential for statistically insignificant data and skewed results, states could require a threshold number of responses in each category of respondents or use a weighted measurement of those responses. States should also establish a simple appeals process for judges who believe that a negative evaluation violated their due process rights, as opposed to requiring a judge to appeal to a higher-level commission or resort to litigation.[218]

## VI. WHAT MAKES A GOOD JUDGE

The presupposition of the debate is that everyone, including the judges themselves, want a judge to be a "good" judge, and each method claims to produce the best judges. Measuring judicial quality has been researched and addressed by many. Which method produces the greatest judicial quality has been examined through the lenses of judicial discipline,[219] sentencing practices, tort awards, frequency of litigation, frequency of discrimination suits,[220] number of women and minority judges,[221] and independence versus accountability.[222] The question might also be tackled by asking what individual char-

211. Schotland, *supra* note 135, at 1100.
212. Alaska and Colorado (merit selection and retention); California, Oregon, North Carolina, Washington, and New York City (election). *Id.* at 1101.
213. *Id.* at 1100.
214. *Id.*
215. *Id.*
216. Washington Citizens' Commission on Salaries for Elected Officials, How Commissioners Are Selected, http://www.salaries.wa.gov/howcommissionersareselected.htm (last visited Dec. 9, 2010). Thank you to Mary McQueen, President, National Center for State Courts, for the reference.
217. Bruce Finley, *Performance Reviews Proposed for Judges*, THE DENVER POST, Oct. 3, 2006; INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT 24 (2006), http://www.du.edu/legalinstitute/pubs/SharedExpectations.pdf.
218. For example, Colorado permits complaints about district commissions to the overarching state commission, but there is no further process other than litigation. *See* COLO. REV. STAT. § 13-5.5-103(1)(p) (stating the "the state commission shall not have the power or duty to review actual determinations made by the district commissions").
219. For an extensive report on the subject of judicial quality and judicial discipline, see REDDICK, *supra* note 195. The report suggests that the merit method may produce fewer unfit judges than judicial elections. *Id.* at 6. Another scholar found a "sharp distinction" between discipline rates of judges initially appointed and those who are elected, with more disciplinary actions regarding elected judges in at least three states. *See* Schotland, *supra* note 135, at 1087–88.
220. For a collection of sources regarding the affect of judicial selection on sentencing practices, tort awards, frequency of litigation, and frequency of discrimination suits, see Schotland, *supra* note 135, at 1087 n.36.
221. *See* M.L. HENRY, JR. ET AL., THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS (1985) (determining that findings indicate that appointment and merit-selection systems increase minority judicial representation to a greater extent than elective systems); *see also* Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, *in* RESEARCH ON JUDICIAL SELECTION 7 (Am. Judicature Soc'y ed. 1999). *But see* Webster, *supra* note 153, at 33 ("Some conclude that the method of selection has little effect upon the number of women and minorities reaching the bench. Others conclude that, while contested elections result in fewer women and minorities reaching the bench than do other systems, women and minorities generally fare better under appointive systems than under 'merit' systems. Still others insist that 'merit' systems bring the greatest number of women and minorities to the bench. The answer to this apparent conundrum may lie in the scope of, and methods used in, the various studies." (footnotes omitted)).
222. *E.g.*, Dubois, *supra* note 133.

acteristics or qualities are desirable in a judge. In 1984, the ABA set forth the favored personal characteristics for a judge as integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, health, financial responsibility, and public service.[223] John Adams, in *Thoughts on Government*, stated that judges "should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men."[224] Given this quote, it seems the merit-selection method may have an edge because it is easier for nominating commissions to ensure the presence of these qualifications, while at the same time judges will not be dependent on a "body of men." But one should bear in mind that either method of selection—merit or election—has the potential to produce good judges. If the electorate is educated and the qualifications to run for office are high, the judge that is selected through the election method may also possess these desired traits. On the other hand, one must also remember that these desired qualities and characteristics are dynamic, not static—a judge selected through the merit method may ultimately become a "bad" judge. And even if the backgrounds and characteristics of judges are carefully scrutinized under both methods, a "stellar resume does not necessarily indicate an excellent analytical mind or first-class judicial craftsmanship."[225]

## VII. CONCLUSION

The various methods currently used for selecting judges have their roots in U.S. history. What began as the lifetime appointments method morphed into the three methods that can be seen in action in the states today: appointment, election, and merit selection. Movements involving politicians, organizations, and the electorate precipitated the development and popularity of each method. These methods have become more complex over time, with the states either modifying them or toggling between them. This complexity is now compounded by the Supreme Court's decisions in *White*, *Citizens United*, and *Caperton*, which have all advanced issues related to judicial elections and campaigns, including free speech and campaign finance. These three cases impact almost all judges, regardless of how they are selected. Merit-selected judges may face the prospect of campaigning during retention elections, and thus, like their elected counterparts, may be affected by the ruling in *Citizens United*. It is only the lifetime appointed judges that need not concern themselves with the implication of that case.

But even though merit-selected and appointed judges may be able to elude the potential pitfalls of judicial campaigns, they must remain cognizant of the propriety of commenting on controversial issues that may come before the court—such comments now seem constitutionally sanctioned after the Supreme Court's decision in *White*. Although a judge up for retention may not be as obliged to comment or announce their views as often as their elected colleagues who are conducting a campaign, they may still make statements on controversial issues that will be impacted by *White*. While the *White* case opens the door to judicial speech on controversial matters, the adoption and implementation of the 2007 ABA Code will hopefully clarify where the outer bounds of *White*'s implications lie.

**Although judges' behavior and actions may be unfairly influenced by the judicial selection method used in their state, there are several means for keeping this undesirable consequence in check . . . .**

Because *Caperton* intimated that judges might have to recuse themselves for perceived favoritism or partiality, this case may also impact both merit-selected and appointed judges. Despite the free speech protections in *White*, these judges might still face recusal or disqualification under *Caperton* if they comment or announce their views on a matter that later appears before them. Additionally, considering *Caperton* alongside *Citizens United* and the resulting clamor over funds being raised in judicial elections, judges need to be aware of who is contributing to their campaigns and the amount of funds given, and whether those two factors may create a perceived or actual bias with respect to any parties appearing before them. Collectively, these recent Supreme Court cases affecting the judiciary still leave much to be resolved.

These three cases, along with the ever-increasing funds raised in judicial campaigns and the continued dissatisfaction with the judiciary as a whole, have reignited the two-century old debate about which method of judicial selection is the best. Asking what method is "best" begs the question of what method produces the "best" judges. The answer depends upon which lens you are looking through. But even then, one must remember that a judge's behavior and conduct may be dynamic, not static.

From the inauguration of the U.S., there have been many arguments for and against the varying methods of selecting judges. Although the election method may appear to be in dire straits, no one method is free from controversy, no one method is perfect, and there is no silver bullet for attaining perfection. What history tells us is that what a particular method claims to accomplish and what the evidence suggests that it accomplishes are sometimes different. More importantly, history tells

223. A copy of the guidelines can be viewed on the Nebraska Judicial Branch's website. Nebraska Judicial Branch, American Bar Association's Guidelines for Reviewing Qualifications of Candidates for State Judicial Office, http://supremecourt.ne.gov/commissions/aba-manual.shtml (last visited Dec. 9, 2010).

224. JOHN ADAMS, *Thoughts on Government: Applicable to the Present State of the American Colonies* (1763), *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS ch. 9 (Liberty Fund 2000).

225. Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 803 n.3 (2004).

us that the debate may go on forever without any true resolution. While this Paper did not attempt to construct a hypothetical, perfect method, it did present some interim remedies. In the context of judicial elections, these measures include campaign finance reform, public financing of judicial campaigns, oversight commissions, mandatory qualifications, extended term lengths, and improved voter education and awareness. In the context of the merit method, these measures include randomly selected citizen nominating commissions, independent court evaluators, and improved court evaluation data through threshold responses, weighted measurements, and an appeals process for negative evaluations.

Although judges' behavior and actions may be unfairly influenced by the judicial selection method used in their state, there are several means for keeping this undesirable consequence in check, including case law, advisory opinions, and judicial codes of conduct. But these factors should only serve as a baseline for what is acceptable conduct for a judge—it is not enough for judges to merely seek technical compliance with the fluctuating methods of selection and retention or the mechanics of judicial directives and mandates. Judges should take a leadership role and become visionaries. In this role, judges may encourage those individuals and organizations engaging in the judicial-selection debate to consider using their energy, talent, and capital to collaborate across the ideological divides and explore a selection method that both accentuates the positive and eliminates the negative aspects of the existing methods. This exploration must include sensitivity to the inculcated cultural and socio-political differences between all judges and all methods. It is not enough to substitute one method for another. To do so would be akin to replacing an engine in a car that has electrical problems in the hope that it would run more efficiently.

Building upon the extensive literature, the dearth of studies, and the numerous prior national and statewide summits and symposia on the subject matter,[226] judges could harness and capitalize on the new fervor in the debate and seek to reframe it. To this end, the American Judges Association could build upon its previous White Paper on fairness, and continue to enhance the credibility of judges, by proposing and hosting a think tank, summit, or symposium on this subject. This approach should not only include judges, scholars, organizations, and lawmakers, as was done in the past to some degree, but should also include a missing component: the socio-cultural experts. This addition could address the difficulty with paradigm shifts, cultural change, and change management. This approach will forge relationships, advance the discussions, and hopefully create a new blueprint for judicial selection. We as judges need to look outside ourselves, think outside the box, shift the paradigm, and consider creating a selection method that recognizes and reinforces the true objective of selecting and retaining judges, that is, impartiality, independence, and accountability. The citizenry needs to trust that when judges are given a choice between impartiality and bias, honesty and dishonesty, and reason and capriciousness, judges will invariably choose the more *honorable* of these concepts.

*Judge Mary A. Celeste is president of the American Judges Association. She is the Presiding Judge of the Denver County Court; she was appointed a member of that court in 2000. Celeste is a graduate of San Diego State University and California Western School of Law, where she was the editor-in-chief of the law journal and the recipient of scholarships, fellowships, and awards. While practicing law, she was a member of the Colorado Bar Association Board of Governors, the Career Service Authority, the Personnel Board for the City and County of Denver, the Denver Bar Association's Conciliation Panel, and the Board of Directors of the Colorado Women's Bar Association, and she is currently the president of the Women's Bar Association Foundation. She has published several articles and has been an adjunct professor of law at the University of Denver College of Law. Celeste has received the Judicial Excellence Award from the Denver Bar Association, the Judicial Excellence Award from the Colorado Women's Bar Association, the American Association of University Women's Trailblazer Award, and the Colorado Humanities Award. She presently sits on the Colorado Advisory Committee for the U.S. Civil Rights Commission.*

226. In 2000, the National Center for State Courts organized the National Summit on Improving Judicial Selection under the leadership of Texas Supreme Court Chief Justice Thomas R. Phillips and Texas Senator Rodney Ellis. *See* NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION (2001), http://www.ncsconline.org/wc/publications/Res_JudSel_CallToActionPub.pdf. The Call to Action included twenty recommendations, which for the most part have gone unanswered with the exception of a follow-up *Symposium on Judicial Campaign Conduct and the First Amendment*, which urged bar associations to take the lead in forming judicial campaign conduct committees. *See* NAT'L CTR. FOR STATE COURTS, SYMPOSIUM ON JUDICIAL CAMPAIGN CONDUCT AND THE FIRST AMENDMENT (2002), http://www.ncsconline.org/WC/Publications/Res_JudSel_JudCampCondEvtPub.pdf. In 2005, "a conference of 38 states' chief justices, justices, judges, and others," sent to the Conference of Chief Justices a call to action that stated, "In the end each State must make its own decisions on what is a suitable selection system." Schotland, *supra* note 135, at 1090. In 2006, the New York State Judicial Institute held the *Symposium on Enhancing Voter Participation on Judicial Elections*. Joy Beane, *Judicial Institute Hosts Voter Education Symposium*, BENCHMARKS, Summer 2006, at 8, *available at* http://www.courts.state.ny.us/publications/benchmarks/issue4/votereducation.shtml. In 2007, California's Judicial Council formed the Commission for Impartial Courts, including the Task Force on Judicial Selection and Retention, which is designed to evaluate "any proposals to improve the methods and procedures of selecting and retaining judges." California Courts, Commission for Impartial Courts, http://www.courtinfo.ca.gov/jc/tflists/commimpart_about.htm. In 2009, Northwestern University School of Law hosted a panel of judges and professors to debate and discuss the issue of how to select judges,

| HISTORY OF REFORM EFFORTS BY STATE* | | | | |
|---|---|---|---|---|
| **STATE** | **START/END METHOD (YEARS)** | **# OF PROCEDURAL MODIFICATIONS (e.g. Creation of Commissions, Terms, Retirement Age) (YEARS)** | **VEHICLES FOR CHANGE** | **# OF FAILED ATTEMPTS TO MODIFY** |
| ALABAMA | 1819-Election<br>1867- Election | (5) 1819, 1830, 1850, 1867, 2009 | None | 4 |
| ALASKA | 1959-Merit<br>1980-Merit | (4) 1959, 1968, 1975, 1980 | None | 3 |
| ARIZONA | 1912-Election<br>1974-Merit | (5) 1912, 1960, 1965, 1974, 1992 | Ballot Initiative | 2 |
| ARKANSAS | 1836-Election<br>2001-Election-nonpartisan | (8)1836, 1848, 1864, 1868, 1874, 1978, 2000, 2001 | Legislative Act,<br>Constitutional Amendment | 4 |
| CALIFORNIA | 1849-Election<br>1998-Election | (11) 1849, 1862, 1879, 1904, 1911, 1926, 1934, 1960, 1979, 1986, 1998 | Legislative Act, Ballot Initiative | ? |
| COLORADO | 1876-Election<br>1966-Merit | (10) 1976, 1891, 1902, 1904, 1913, 1966, 1970, 1982, 1988, 2008 | Constitutional Amendment | 2 |
| CONNECTICUT | 1784-Election<br>1818-Appointment | (8) 1784, 1818, 1856, 1876, 1880, 1965, 1982, 1986 | Legislative Act,<br>Constitutional Amendment | 0 Since 2000 |
| DELAWARE | 1776-Appointment<br>1897-Appointment | (6) 1776, 1792, 1831, 1897, 1951, 1977 | None | 0 Since 2000 |
| DISTRICT OF COLUMBIA | 1970-Appointment<br>1986-Appointment | (5) 1970, 1973, 1977, 1984, 1986 | None | 1 |
| FLORIDA | 1845-Election<br>2001-Election | (15) 1845, 1848, 1851, 1853, 1861, 1868, 1875, 1885, 1942, 1957, 1971, 1972, 1976, 1998, 2001 | Legislative Act, Executive Order,<br>Constitutional Amendment | 4 |
| GEORGIA | 1777-Appointment<br>1983-Elections-nonpartisan | (15) 1777, 1789, 1798, 1812, 1835, 1845, 1865, 1868, 1877, 1896, 1898, 1906, 1972, 1983, 2000 | Legislative Act,<br>Constitutional Amendment | 0 Since 2000 |
| HAWAII | 1959-Appointment<br>1978-Appointment | (3) 1959, 1968, 1978 | None | 2 |
| IDAHO | 1890-Election<br>1934-Election nonpartisan | (6) 1890, 1934, 1967, 1980, 1982, 2003 | Constitutional Amendment | 5 |
| ILLINOIS | 1818-Election<br>1964-Election partisan | (6) 1818, 1848, 1870, 1964, 1992, 2009 | Constitutional Amendment | 4 |
| INDIANA | 1816-Appointment<br>1970-Appointment +<br>Elections partisan | (7) 1816, 1851, 1871, 1881, 1891, 1970, 1986 | Constitutional Amendment | 2 |
| IOWA | 1846-Election<br>1962-Merit | (9) 1846, 1857, 1868, 1876, 1915, 1962, 1973, 1976, 2007 | Constitutional Amendment | 0 Since 2000 |
| KANSAS | 1861-Election<br>1958-Merit | (6) 1861, 1895, 1958, 1972, 1977, 2006 | Constitutional Amendment | 3 |
| KENTUCKY | 1792-Appointment<br>1975-Election nonpartisan | (3) 1792, 1850, 1975 | Constitutional Amendment | 1 |
| LOUISIANA | 1812-Appointment<br>1904-Election | (12) 1812, 1845, 1852, 1864, 1868, 1879, 1904, 1906, 1921, 1974, 2000, 2006 | Constitutional Amendment | 10 |
| MAINE | 1819-Appointment<br>1839-Appointment | (2) 1819, 1839 | None | 0 Since 2000 |
| MARYLAND | 1776-Appointment<br>1851-Election | (9) 1776,1837,1851, 1864, 1966, 1968, 1970, 1971, 1976 | Legislative Act | 0 Since 2000 |
| MASSACHUSETTS | 1780-Appointment<br>1972-Appointment | (2) 1780, 1972 | None | 0 Since 2000 |
| MICHIGAN | 1836-Appointment<br>1850-Election | (7) 1836, 1850, 1908, 1939, 1963, 1968, 1996 | Constitutional Amendment | 0 Since 2000 |
| MINNESOTA | 1857-Election<br>1912-Election nonpartisan | (5) 1857, 1883, 1912, 1983, 1989 | Legislative Act | 2 |
| MISSISSIPPI | 1817-Appointment<br>2008-Elections nonpartisan | (11) 1817, 1832, 1868, 1890, 1910, 1914, 1993, 1994, 1999, 2002, 2008 | Constitutional Amendment | 1 |
| MISSOURI | 1820-Appointment<br>1940-Nonpartisan Selection | (13) 1820, 1849, 1872, 1875, 1884, 1909, 1940, 1942, 1945, 1970, 1973, 1976, 2008 | Constitutional Amendment | 5 |
| MONTANA | 1889-Election<br>1935-Election nonpartisan | (6) 1889, 1909, 1911, 1935, 1972, 1973 | Constitutional Amendment | 1 |
| NEBRASKA | 1866-Election<br>1962-Merit | (7) 1866, 1875, 1909, 1920, 1962, 1974, 1990 | Constitutional Amendment | 1 |

## HISTORY OF REFORM EFFORTS BY STATE*

| STATE | START/END METHOD (YEARS) | # OF PROCEDURAL MODIFICATIONS (e.g. Creation of Commissions, Terms, Retirement Age) (YEARS) | VEHICLES FOR CHANGE | # OF FAILED ATTEMPTS TO MODIFY |
|---|---|---|---|---|
| NEVADA | 1864-Election<br>1976-Election | (3) 1864, 1976, 1972 | None | 7 |
| NEW HAMPSHIRE | 1784-Appointment<br>2005-Appointment | (5) 1784, 1792, 2000, 2001, 2005 | None | 3 |
| NEW JERSEY | 1776-Appointment<br>1994-Appointment | (5) 1776, 1844, 1902, 1947, 1994 | None | 1 |
| NEW MEXICO | 1912-Election<br>1988-Appointment +<br>Election partisan (hybrid system) | (5) 1912, 1952, 1965, 1988, 1994 | Constitutional Amendment | 1 |
| NEW YORK | 1777-Appointment<br>1977-Merit | (9) 1777, 1822, 1847, 1876, 1895, 1913, 1961, 1975, 1977 | Constitutional Amendment | 0 Since 2000 |
| NORTH CAROLINA | 1776-Appointment<br>2002-Election nonpartisan | (7) 1776, 1868, 1967, 1977, 1996, 2001, 2002 | Executive Order<br>Legislative Act | 6 |
| NORTH DAKOTA | 1889-Election<br>1909-Election nonpartisan | (7) 1889, 1909, 1930, 1967, 1976, 1987, 1998 | Legislative Act | 0 Since 2000 |
| OHIO | 1802-Election<br>1912-Election | (7) 1802, 1851, 1883, 1892, 1912, 1913, 1968 | None | 1 |
| OKLAHOMA | 1907-Election<br>1987-Merit | (5) 1907, 1909, 1967, 1968, 1987 | Constitutional Amendment | 2 |
| OREGON | 1859-Election<br>1931-Election nonpartisan | (7) 1859, 1878, 1910, 1931, 1961, 1969, 1976 | Legislative Act | 4 |
| PENNSYLVANIA | 1776-Appointment<br>1968-Election partisan | (10) 1776, 1790, 1838, 1850, 1874, 1895, 1913, 1921, 1964, 1968 | Constitutional Amendment | 7 |
| RHODE ISLAND | 1842-Election<br>1994-Merit + Appointment | (7) 1842, 1902, 1905, 1932, 1956, 1994, 2007 | Legislative Act<br>Constitutional Amendment | 0 Since 2000 |
| SOUTH CAROLINA | 1776-Election<br>1996-Merit w/Election | (12) 1776, 1778, 1790, 1865, 1868, 1895, 1911, 1976, 1979, 1984, 1990, 1996 | Constitutional Amendment | 4 |
| SOUTH DAKOTA | 1889-Election<br>1980-Merit | (4) 1889, 1921, 1972, 1980 | Legislative Act<br>Constitutional Amendment | 1 |
| TENNESSEE | 1796-Election<br>1971-Merit | (8) 1796, 1835, 1853, 1971, 1974, 1994, 2001, 2009 | Legislative Act | 2 |
| TEXAS | 1845-Appointment<br>1891-Election | (6) 1845, 1866, 1869, 1876, 1891, 1965 | Constitutional Amendment | 12 |
| UTAH | 1896-Election<br>1985-Merit | (8) 1896, 1945, 1951, 1967, 1985, 1987, 1994, 2007 | Ballot Initiative | 0 Since 2000 |
| VERMONT | 1777-Appointment<br>1974-Merit | (6) 1777, 1786, 1850, 1870, 1967, 1974 | Ballot Initiative | 0 Since 2000 |
| VIRGINIA | 1776-Election<br>1870-Election by General Assembly | (8) 1776, 1850, 1864, 1870, 1970, 1983, 2002, 2008 | Constitutional Amendment | 1 |
| WASHINGTON | 1889-Election<br>1969-Election nonpartisan | (5) 1889, 1907, 1969, 1995, 2006 | Constitutional Amendment | 2 |
| WEST VIRGINIA | 1862-Election<br>2010-Election | (6) 1862, 1872, 1974, 2000, 2010, 2010 | None | 0 Since 2000 |
| WISCONSIN | 1848-Election<br>1977-Election | (8) 1848, 1853, 1889, 1977, 1983, 1987, 2001, 2009 | Constitutional Amendment<br>Executive Order | 0 Since 2000 |
| WYOMING | 1890-Elected<br>1972-Merit | (5 ) 1890, 1972, 1976, 1977, 2000 | Constitutional Amendment | 0 Since 2000 |

* This appendix was compiled from information found on the American Judicature Society website, http://www.judicialselection.us/ (last visited Dec. 14, 2010).